

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

**AMBER M. POINTER,**

**08-CV-6062-BR**

**Plaintiff,**

**OPINION AND ORDER**

**v.**

**MICHAEL J. ASTRUE,  
Commissioner, Social Security  
Administration,**

**Defendant.**

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**BROWN, Judge.**

Plaintiff Amber M. Pointer seeks judicial review of a final decision of the Commissioner of the Social Security Administration (SSA) in which he denied Plaintiff's application for Supplemental Security Income (SSI) payments under Title XVI of the Social Security Act. Plaintiff seeks an order reversing the decision of the Commissioner and remanding this action for an award of benefits.

This Court has jurisdiction to review the Commissioner's decision pursuant to 42 U.S.C. § 405(g). Following a review of the record, the Court **REVERSES** the decision of the Commissioner and **REMANDS** this matter pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings consistent with this Opinion and Order.

**ADMINISTRATIVE HISTORY**

Plaintiff filed her application for SSI on April 30, 1991, when she was still a child and alleged a disability onset date of April 1, 1991. Tr. 22.<sup>1</sup> The SSA granted Plaintiff's application. On June 20, 2003, Plaintiff turned 18 and the Commissioner reevaluated her disability "to see if [Plaintiff's] health has improved." Tr. 28. On December 10, 2003, the Commissioner determined Plaintiff's health had improved and she could work. Tr. 28. Plaintiff requested reconsideration of the Commissioner's decision on May 25, 2004. The Commissioner, however, determined Plaintiff was not disabled. Tr. 54. An Administrative Law Judge (ALJ) held a hearing on August 17, 2005. Tr. 297-328. At the hearing, Plaintiff was represented by an attorney. Plaintiff, her mother, and a vocational expert (VE) testified.

The ALJ issued an opinion on December 29, 2005, in which he found Plaintiff was not disabled and, therefore, was not entitled to benefits. Tr. 12-21. Pursuant to 20 C.F.R. § 404.984(d), the ALJ's decision became the final decision of the Commissioner on December 29, 2005. On March 21, 2006, Plaintiff sought judicial review of the Commissioner's decision.

On March 20, 2007, the Honorable Ann Aiken issued an Order

<sup>1</sup> Citations to the official transcript of record filed by the Commissioner on June 25, 2008, are referred to as "Tr."

reversing and remanding the ALJ's decision for further administrative proceedings pursuant to stipulation of the parties. Tr. 342-43. The Court directed the ALJ to (1) hold a supplemental hearing, (2) "[a]djudicate the claim by applying the five-step sequential evaluation for adults," (3) reevaluate the medical evidence, and (4) update the medical record.

On November 20, 2007, the ALJ held a hearing on remand. Tr. 329-41. At the hearing, Plaintiff was represented by an attorney and a VE testified. On December 19, 2007, the ALJ issued his opinion in which he again found Plaintiff was not disabled and, therefore, was not entitled to benefits. Pursuant to 20 C.F.R. § 404.984(d), the ALJ's decision became the final decision of the Commissioner on December 19, 2007. On February 20, 2008, Plaintiff again sought review of the Commissioner's decision in this Court.

#### BACKGROUND

Plaintiff was born on June 20, 1985; was 20 years old at the time of the first hearing before the ALJ; and was 22 years old at the second hearing. Tr. 22, 301. Plaintiff completed tenth grade. Tr. 367. Plaintiff has past relevant work experience as a hostess, courtesy clerk, kitchen helper, and general laborer/stocker. Tr. 325, 340.

Plaintiff alleges disability due to depression, hearing

problems, and problems with reading and spelling. Tr. 12.

The ALJ found Plaintiff has the severe impairments of major depressive disorder and mild bilateral hearing loss. Tr. 334. The ALJ also found the remainder of Plaintiff's alleged conditions are not severe. Tr. 334. The ALJ concluded Plaintiff is not disabled on the ground that she retains the residual functional capacity (RFC) to perform her past relevant work as a kitchen helper. Tr. 340. Accordingly, the ALJ determined Plaintiff is not entitled to benefits. Tr. 341.

Except when noted, Plaintiff does not challenge the ALJ's summary of the medical evidence. After carefully reviewing the medical records, this Court adopts the ALJ's summary of the medical evidence. See Tr. 334-35, 339-40.

#### STANDARDS

The initial burden of proof rests on the claimant to establish disability. *Ukolov v. Barnhart*, 420 F.3d 1002, 1004 (9<sup>th</sup> Cir. 2005). To meet this burden, a claimant must demonstrate her inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The Commissioner bears the burden of developing the record. *Reed v. Massanari*, 270 F.3d 838, 841

(9<sup>th</sup> Cir. 2001).

The district court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g). See also *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9<sup>th</sup> Cir. 2004). "Substantial evidence means more than a mere scintilla, but less than a preponderance, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9<sup>th</sup> Cir. 2006)(internal quotations omitted).

The ALJ is responsible for determining credibility, resolving conflicts in the medical evidence, and resolving ambiguities. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001). The court must weigh all of the evidence whether it supports or detracts from the Commissioner's decision. *Robbins*, 466 F.3d at 882. The Commissioner's decision must be upheld even if the evidence is susceptible to more than one rational interpretation. *Webb v. Barnhart*, 433 F.3d 683, 689 (9<sup>th</sup> Cir. 2005). The court may not substitute its judgment for that of the Commissioner. *Widmark v. Barnhart*, 454 F.3d 1063, 1070 (9<sup>th</sup> Cir. 2006).

### **DISABILITY ANALYSIS**

The Commissioner has developed a five-step sequential inquiry to determine whether a claimant is disabled within the meaning of the Act. *Parra v. Astrue*, 481 F.3d 742, 746 (9<sup>th</sup> Cir. 2007). See also 20 C.F.R. § 416.920. Each step is potentially dispositive.

In Step One, the claimant is not disabled if the Commissioner determines the claimant is engaged in substantial gainful activity. *Stout v. Comm'r Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9<sup>th</sup> Cir. 2006). See also 20 C.F.R. § 416.920(a)(4)(I).

In Step Two, the claimant is not disabled if the Commissioner determines the claimant does not have any medically severe impairment or combination of impairments. *Stout*, 454 F.3d at 1052. See also 20 C.F.R. § 416.920(a)(4)(ii).

In Step Three, the claimant is disabled if the Commissioner determines the claimant's impairments meet or equal one of a number of listed impairments that the Commissioner acknowledges are so severe they preclude substantial gainful activity. *Stout*, 454 F.3d at 1052. See also 20 C.F.R. § 416.920(a)(4)(iii). The criteria for the listed impairments, known as Listings, are enumerated in 20 C.F.R. part 404, subpart P, appendix 1 (Listed Impairments).

If the Commissioner proceeds beyond Step Three, he must assess the claimant's RFC. The claimant's RFC is an assessment

of the sustained, work-related physical and mental activities the claimant can still do on a regular and continuing basis despite her limitations. 20 C.F.R. § 416.920(e). See also Social Security Ruling (SSR) 96-8p. "A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent schedule." SSR 96-8p at \*1. In other words, the Social Security Act does not require complete incapacity to be disabled. *Smolen v. Chater*, 80 F.3d 1273, 1284 n.7 (9<sup>th</sup> Cir. 1996). The assessment of a claimant's RFC is at the heart of Steps Four and Five of the sequential analysis engaged in by the ALJ when determining whether a claimant can still work despite severe medical impairments. An improper evaluation of the claimant's ability to perform specific work-related functions "could make the difference between a finding of 'disabled' and 'not disabled.'" SSR 96-8p at \*4.

In Step Four, the claimant is not disabled if the Commissioner determines the claimant retains the RFC to perform work she has done in the past. *Stout*, 454 F.3d at 1052. See also 20 C.F.R. § 416.920(a)(4)(iv).

If the Commissioner reaches Step Five, he must determine whether the claimant is able to do any other work that exists in the national economy. *Stout*, 454 F.3d at 1052. See also 20 C.F.R. § 416.920(a)(4)(v). Here the burden shifts to the Commissioner to show a significant number of jobs exist in the

national economy that the claimant can do. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9<sup>th</sup> Cir. 1999). The Commissioner may satisfy this burden through the testimony of a VE or by reference to the Medical-Vocational Guidelines set forth in the regulations at 20 C.F.R. part 404, subpart P, appendix 2. If the Commissioner meets this burden, the claimant is not disabled. 20 C.F.R. § 416.920(g)(1).

**ALJ'S FINDINGS**

At Step One, the ALJ found Plaintiff has not engaged in substantial gainful activity since December 1, 2003, the date on which the Commissioner determined Plaintiff was no longer disabled. Tr. 334.

At Step Two, the ALJ found Plaintiff has the severe impairments of major depressive disorder and mild bilateral hearing loss. Tr. 334. The ALJ concluded the remainder of Plaintiff's alleged conditions are not severe. Tr. 334.

At Step Three, the ALJ concluded Plaintiff's impairments do not meet or equal the criteria for any Listed Impairment from 20 C.F.R. part 404, subpart P, appendix 1. The ALJ assessed Plaintiff's RFC and found after December 1, 2003, Plaintiff did not have any exertional limitations and had the following nonexertional limitations: the ability "to understand, remember, and carry out [only] simple tasks"; to "maintain concentration

and attention on simple tasks for up to 2 hours at a time"; and "to interact with co-workers and supervisors but should avoid contact with members of the general public." Tr. 337.

At Step Four, the ALJ found Plaintiff is able to perform her past relevant work as a kitchen helper. Tr. 340. Accordingly, the ALJ concluded Plaintiff is not disabled and, therefore, is not entitled to benefits. Tr. 341.

#### DISCUSSION

Plaintiff contends the ALJ erred when he (1) failed to give sufficient reasons for rejecting the opinion of John Cochran, Ph.D.; (2) did not include Plaintiff's functional limitations relating to Plaintiff's hearing impairment in his assessment of Plaintiff's RFC; (3) failed to resolve the conflicting testimony of the VE at the first hearing that Plaintiff could not perform her past relevant work and the testimony of the VE at the second hearing that Plaintiff could perform her past relevant work; and (4) concluded Plaintiff could perform her past relevant work as a kitchen helper.

**I. The ALJ erred when he gave "little weight" to the opinion of Dr. Cochran.**

An ALJ may reject an examining or treating physician's opinion when it is inconsistent with the opinions of other treating or examining physicians if the ALJ makes "findings setting forth specific, legitimate reasons for doing so that are

based on substantial evidence in the record." *Thomas*, 278 F.3d at 957 (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989)). When the medical opinion of an examining or treating physician is uncontested, however, the ALJ must give "clear and convincing reasons" for rejecting it. *Thomas*, 278 F.3d at 957. See also *Lester v. Chater*, 81 F.3d 821, 830-32.

When "the ALJ fail[s] to provide legally sufficient reasons for rejecting . . . [a] physician['s] opinion[]," the Court credits the opinion as true. *Benecke v. Barnhart* 379 F.3d 587, 594 (9<sup>th</sup> Cir. 2004). See also *Lester*, 81 F.3d at 834 (improperly rejected physician's opinion, which the court then credited as a matter of law).

An ALJ may reject a physician's opinion if it is based entirely on the claimant's subjective complaints and not supported by clinical evidence in the record. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005). "[Q]uestioning the credibility of the patient's complaints where the doctor does not discredit those complaints and supports [her] ultimate opinion with [her] own observations" is not, however, a legally sufficient reason for rejecting a physician's opinion. *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1199-1200 (9<sup>th</sup> Cir. 2008).

On May 15, 2005, Dr. Cochran conducted a psychological evaluation of Plaintiff. As part of the examination, Plaintiff underwent the following tests: Minnesota Multiphasic Personality

Inventory-2, Neurobehavioral Cognitive Screening Examination, Luria-Nebraska Neuropsychological Battery for Adults, Wechsler Memory Scale-R, and Millon Clinical Multiaxial Inventory-II.

Tr. 281. Dr. Cochran diagnosed Plaintiff with dysthymic disorder (early onset), somatization disorder, generalized anxiety disorder, cognitive disorder, social phobia, and personality disorder (not otherwise specified). Tr. 281-94. Dr. Cochran opined Plaintiff had moderate restrictions in her ability to understand and to remember detailed instructions; to carry out detailed instructions; and to interact appropriately with the public, supervisors, and co-workers. Tr. 296. Dr. Cochran opined Plaintiff had marked restrictions in her ability to respond appropriately to changes in a routine work setting.

Tr. 296. The form filled out by Dr. Cochran defines moderate restrictions as "moderate limitations . . . but the individual is still able to function satisfactorily" and marked restrictions as a "serious limitation . . . the ability to function is limited but not precluded." Tr. 296. The ALJ did not find Dr. Cochran's opinion was contradicted by the opinion of another treating or examining physician. Nevertheless, the ALJ gave "little weight" to Dr. Cochran's opinion on the grounds that "Dr. Cochran's assessment relies on [Plaintiff's] subjective complaints, not medical evidence [and] . . . [is] inconsistent with [Plaintiff's] activities of daily living, recent work activity and conservative

treatment history." Tr. 340.

As noted, however, Dr. Cochran conducted a number of psychodiagnostic tests of Plaintiff. Although Dr. Cochran relied on Plaintiff's subjective complaints in part, his diagnoses and opinions also arose from the results of these clinical tests. In addition, Dr. Cochran noted in his report that he reviewed the material in Plaintiff's file, which indicates he considered Plaintiff's activities of daily living and work history when he formulated his diagnosis and opinion.

On this record, the Court concludes the ALJ erred when he gave little weight to the opinion of Dr. Cochran because the ALJ did not provide clear and convincing reasons based on substantial evidence in the record for doing so.

**II. The ALJ did not err when he failed to include limitations based on Plaintiff's hearing impairment in his assessment of Plaintiff's RFC.**

Plaintiff asserts the ALJ erred when he failed to include any functional limitations as to Plaintiff's hearing impairment in his assessment of Plaintiff's RFC. Plaintiff points out that on May 11, 2004, Judy Stamper, A.N.P., diagnosed Plaintiff with "hearing loss/hearing disability." Tr. 221.

Medical sources are divided into two categories: "acceptable" and "not acceptable." 20 C.F.R. § 416.902. Acceptable medical sources include licensed physicians and psychologists. 20 C.F.R. § 416.902. Medical sources classified

as "not acceptable" include, but are not limited to, nurse practitioners, therapists, licensed clinical social workers, and chiropractors. SSR 06-03p, at \*2. The ALJ may assign a not-acceptable medical source either greater or lesser weight than that of an acceptable medical source. SSR 06-03p, at \*5-\*6. The ALJ, however, must explain the weight assigned to such sources to the extent that a claimant or subsequent reviewer may follow the ALJ's reasoning. SSR 06-03p, at \*6.

The ALJ gave little weight to the opinion of A.N.P. Stamper because she is a "not acceptable" medical source; her opinion was contradicted by the opinions of John S. Donovan, M.D., Plaintiff's treating physician, and Norman D. Frink, M.S., C.C.C.-A, examining physician; and her report was vague and lacked support for the finding of disability. Tr. 340. Dr. Donovan noted Plaintiff had "normal hearing," and she was able to hear him talking in "quiet conversational tones." Tr. 163. Dr. Frink found Plaintiff had "mild sensori-neural hearing loss in both ears" and opined Plaintiff was a "marginal candidate for amplification." Tr. 203. Dr. Frink recommended binaural amplification "due to the significant perceived hearing difficulties and the beneficial amplification indicated by the hearing aid evaluation." Tr. 203. A.N.P. Stamper's report is one page and does not contain any information as to the testing performed or the results of the testing.

On this record, the Court concludes the ALJ did not err when he failed to include any functional limitations as to Plaintiff's hearing impairment in his assessment of Plaintiff's RFC because the ALJ provided legally sufficient reasons based on substantial evidence in the record for doing so.

**III. Plaintiff's remaining issues.**

Plaintiff's remaining issues relate to the ALJ's determination that Plaintiff was able to perform her past relevant work as a kitchen helper. The ALJ based his conclusions on the VE's testimony in response to the hypothetical posed by the ALJ. The Court already has concluded the ALJ improperly rejected the testimony of Dr. Cochran, and, therefore, the Court also finds the ALJ improperly failed to include in the hypothetical to the VE Plaintiff's limitations as identified by Dr. Cochran. The Court also notes the ALJ did not reconcile the VE testimony at the first hearing that Plaintiff cannot perform her past relevant work and the VE testimony at the hearing on remand that Plaintiff can perform her past relevant work as a kitchen helper.

Accordingly, the Court concludes the ALJ erred when he determined Plaintiff could perform her past relevant work as a kitchen helper based on an incomplete hypothetical to the VE.

**IV. Remand for further proceedings.**

The decision whether to remand this case for further

proceedings or for the payment of benefits is within the discretion of the court. *Harman v. Apfel*, 211 F.3d 1172, 1178 (9<sup>th</sup> Cir. 2001).

The decision whether to remand for further proceedings or for immediate payment of benefits generally turns on the likely utility of further proceedings. *Id.* at 1179. The court may "direct an award of benefits where the record has been fully developed and where further administrative proceedings would serve no useful purpose." *Smolen*, 80 F.3d at 1292.

The Ninth Circuit has established a three-part test "for determining when evidence should be credited and an immediate award of benefits directed." *Harman*, 211 F.3d at 1178. The court should grant an immediate award of benefits when:

- (1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

*Id.* The second and third prongs of the test often merge into a single question: Whether the ALJ would have to award benefits if the case were remanded for further proceedings. *Id.* at 1178 n.2.

Here the Court finds a remand for further proceedings is required because the ALJ erred when he gave "little weight" to Dr. Cochran's opinion. Thus, further proceedings are necessary to determine whether Plaintiff is disabled within the meaning of

the Social Security Act and can perform past relevant work or other work existing in significant numbers in the economy. On remand the Court also directs the ALJ to resolve the contradictions in the vocational evidence. Specifically, the ALJ is directed to resolve the conflict between the testimony of the VE at the 2005 hearing that Plaintiff cannot perform her past relevant work and the testimony of the VE at the 2007 hearing that Plaintiff can perform her past relevant work.

#### CONCLUSION

For these reasons, the Court **REVERSES** the decision of the Commissioner and **REMANDS** this matter pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings consistent with this Opinion and Order.

With respect to future proceedings in this matter after remand, § 406(b) of the Social Security Act "controls fees for representation [of Social Security claimants] in court." *Gisbrecht v. Barnhart*, 535 U.S. 789, 794 (2002)(citing 20 C.F.R. § 404.1728(a)). Under 42 U.S.C. § 406(b), "a court may allow 'a reasonable [attorneys'] fee . . . not in excess of 25 percent of the . . . past-due benefits' awarded to the claimant." *Id.* at 795 (quoting 42 U.S.C. § 406(b)(1)(A)). Because § 406(b) does not provide a time limit for filing applications for attorneys' fees and Federal Rule 54(d)(2)(B) is not practical in the context

of Social Security sentence-four remands, Federal Rule of Civil Procedure 60(b)(6) governs. *Massett v. Astrue*, 04-CV-1006 (Brown, J.)(issued June 30, 2008). See also *McGraw v. Barnhart*, 450 F.3d 493, 505 (10<sup>th</sup> Cir. 2006). To ensure that any future application for attorneys' fees under § 406(b) is filed "within a reasonable time" as required under Rule 60(b)(6), the Court orders as follows: If the Commissioner finds Plaintiff is disabled on remand and awards Plaintiff past-due benefits and if, as a result, Plaintiff intends to submit such application for attorneys' fees under § 406(b), Plaintiff shall submit any such application within 60 days from receipt of the Notice of Award by the Commissioner.

IT IS SO ORDERED.

DATED this 6<sup>th</sup> day of April, 2009.

/s/ Anna J. Brown

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ANNA J. BROWN  
United States District Judge